92-1149

No. _____

Supreme Court, U.S.
FILED
JAN 5 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GLEN MAC MURDOCK, JR., et al.,

Petitioners,

v.

UTE DISTRIBUTION CORPORATION,
a Utah corporation;
MANUEL LUJAN, Secretary of the United States
Department of the Interior,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does erroneous dictum in *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), preclude Petitioners from litigating the issue of whether the Affiliated Ute Citizens (AUC) and not the Ute Distribution Corporation (UDC) is the statutorily authorized representative for the management of the mixed blood Utes' interest in the undivided assets of the Ute Indian Tribe?

LIST OF PARTIES

Petitioners are Glen Mac Murdock, Jr., Mac Eugene Murdock, and the Affiliated Ute Citizens of the State of Utah.

Respondents are the Ute Distribution Corporation, a Utah corporation, and Manuel Lujan, Secretary of the United States Department of the Interior.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Murdock v. Ute Indian Tribe of Uintah & Ouray Resv.*, 975 F.2d 683 (10th Cir. 1992), and is reproduced as Appendix A to this Petition. The district court's unreported Order is reproduced as Appendix B. The District Court's Judgment pursuant to Fed. R. Civ. P. 54(b) is reproduced as Appendix C.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its opinion in this case on September 9, 1992. Petitioners' Petition For Writ of Certiorari was originally due to be filed on December 8, 1992. On November 19, 1992, Petitioners filed a motion for an Order extending the time for the filing of the Petition for Writ of Certiorari until February 8, 1993. On November 30, 1992, Justice Byron R. White of this Court entered an Order extending the time for the filing of Petitioners' Petition For Certiorari until January 7, 1993. Petitioners have timely filed this Petition before that date. Therefore, this Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE

25 U.S.C., § 667e, App. 23
25 U.S.C., § 667i, App. 24
25 U.S.C., § 667l, App. 26
25 U.S.C., § 667m, App. 29
25 U.S.C., § 667o, App. 30
25 U.S.C., § 667p, App. 31

STATEMENT OF THE CASE

Petitioners Glen Mac Murdock, Jr., a mixed blood Ute, his son, Eugene Mac Murdock, and the Affiliated Ute Citizens (AUC), filed the instant action seeking various

relief, including a declaratory judgment that the Affiliated Ute Citizens and not the Ute Distribution Corporation (UDC), is the mixed blood Utes' statutorily authorized representative for the management of their interests in the undivided assets of the Ute Indian Tribe pursuant to § 677i of the Ute Partition Act, 25 U.S.C., 677-677aa (hereinafter "the Act"). (App. 4-5; 24-26) The district court held that it had subject matter jurisdiction of the Petitioners' claims under the Act, pursuant to 28 U.S.C. § 1331. (App. 18)

Section 677e of Ute Partition Act permitted the mixed blood group to form an organization to represent the group for certain purposes of the Act. In 1956, in accordance with the requirements of § 677e, the mixed blood Utes created the Affiliated Ute Citizens (AUC) to act as their authorized representative. (App. 23) Thereafter, pursuant to § 677i of the Act, the AUC, as the authorized representative of the mixed blood Utes, and the Tribal Business Committee, as the authorized representative of the full blood Utes, divided "by agreement" the assets of the Ute Indian Tribe which were then capable of equitable and practicable distribution. (App. 24) The tribal assets apportioned to the mixed blood group in this division were to be held by the AUC for subsequent distribution to the individual members of the mixed blood group. The

distribution of these assets to individual mixed blood Utes was to be made pursuant to a plan for distribution to be adopted by the mixed blood Utes under § 677l of the Act. (App. 26) However, no such plan was ever adopted by the mixed blood group or by the AUC, and these assets were never distributed to the individual members of the mixed blood group.

Section 677m of the Act provided that in the event the divided tribal assets apportioned to the mixed blood group were not distributed to the individual members thereof, within seven years from August 27, 1954, that the Secretary of the Interior was authorized to make such distribution. (App. 29-30) However, the Secretary never distributed these assets to the individual mixed members of the mixed blood group.

As to the tribal assets that were not divided "by agreement" of the mixed blood and full blood groups, § 677i of the Act provided that such assets were to be administered jointly by the authorized representatives of the two groups. Section 667o of the Act provided that the undivided assets were to remain tribal property subject to the Act, any other provision of the Act notwithstanding. (App. 24, 30)

In 1958, certain individuals purporting to act on behalf of the mixed blood Utes but with no legal authority to do so, incorporated the Ute Distribution Corporation (UDC) under the laws of the State of Utah. The UDC was created for the ostensible purpose of managing the mixed blood Utes' interest in the undivided assets of the Ute Indian Tribe. Petitioners claim and will demonstrate that the creation of the UDC was not authorized by the

AUC, as the authorized representative of the mixed blood Utes, and was not established in compliance with the requirements of § 677e of the Act. (App. 23)

Following its creation, the UDC issued stock to each mixed blood Ute purporting to represent their individual interest in the undivided tribal assets of the Ute Indian Tribe. Thereafter, the Secretary of the Interior, in violation of his trust and fiduciary responsibilities to the mixed blood group, authorized and permitted mixed blood Utes to sell or transfer their interests in the undivided assets of the Ute Indian Tribe to non-members of the Tribe, in violation of the Act which restricts the right to participate in tribal assets to members of the Ute Indian Tribe. 25 U.S.C. § 677i, § 677o. (App. 24, 30)

In *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 144 (1972), the AUC, on its own behalf, and on behalf of the mixed blood Utes, brought suit against the United States, seeking a pro rata distribution to the individual members of the mixed blood group, of the group's interest in the mineral estate underlying the reservation, and a determination that the AUC and not the UDC is entitled to manage that property jointly with the business committee of the full blood Utes. The district court dismissed the case for lack of subject matter jurisdiction and the Court of Appeals for the Tenth Circuit affirmed. Neither court addressed the authorized representative issue.

In the meantime, 85 individual mixed blood Utes filed another action, *Reyos v. United States*, 431 F.2d 1337 (10th Cir. 1970), seeking damages against the defendant bank, certain of its officers, two automobile dealers, and

the Secretary of the Interior, for damages allegedly suffered in connection with the sale of stock issued to the mixed blood Ute plaintiffs by the UDC, due to the defendants' alleged violations of Section 10(B)(5) of the Securities Exchange Act of 1933 and the Securities Exchange Act of 1934. These violations consisted in facilitating and encouraging the sale of this stock by means prohibited under the securities laws, resulting in the sale of the UDC stock by the plaintiff mixed blood Utes for less than fair value.

On appeal, this Court consolidated the *Affiliated Ute* and *Reyos* cases for hearing because the cases arose in the same factual context. In *Affiliated Ute*, the United States erroneously represented that the AUC had created the UDC pursuant to a plan adopted by the AUC for the distribution of assets to the mixed blood Utes. In support of this argument, the United States cited resolutions passed by the AUC and certain documents which, in fact, did not refer to any plan adopted by the AUC to create the UDC. These resolutions and documents were maintained in the files of an Interior Department attorney, and the mixed blood petitioners in *Affiliated Ute* did not have access to these documents to prove that they did not relate to the creation of the UDC, as the Government contended.

After affirming the dismissal of *Affiliated Ute* for lack of subject matter jurisdiction, this Court, based upon the unsupported argument of the United States, observed in dictum that the AUC had created the UDC and had irrevocably delegated to the UDC the power to manage the interests of the mixed blood group in the undivided assets of the Ute Indian Tribe. 406 U.S. 128, 136.

In the case at bar, Petitioners presented new evidence to prove that the United States had misrepresented the facts and evidence relating to the formation of the UDC in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 144 (1972). (App. 40-47) Respondents did not rebut Petitioners' new evidence in the district court or in the Court of Appeals, but argued that Petitioners were collaterally estopped from litigating the authorized representative issue. The district court so held and dismissed the UDC and the Secretary of the Interior from the suit. (App. 4) The district court later entered a final judgment as to this single issue pursuant to Fed. R. Civ. P. 54(b). (App. 5) On appeal, the Court of Appeals for the Tenth Circuit affirmed the district court's ruling. (App. 2)

In holding that Petitioners were precluded from litigating the authorized representative issue, the district court relied on the erroneous dictum in *Affiliated Ute* and several other cases incorporating this dictum. However, the district court did not rely on this Court's decision in *Reyos v. United States*, to support its decision. (App. 4, n. 3) Conversely, the Court of Appeals held that the authorized representative issue was necessarily decided in *Reyos*, and that because *Reyos* was decided with *Affiliated Ute*, Petitioners were collaterally estopped from litigating the issue the erroneous dictum in *Affiliated Ute*. (App. 10-12) The Court of Appeals failed to address Petitioners' evidence that the United States had misrepresented the facts concerning the formation of the UDC in *Affiliated Ute*, in rejecting Petitioners' contention that the authorized representative issue was not fully or fairly litigated

in *Affiliated Ute* such that Petitioners should not be collaterally estopped from litigating the issue in this action. (App. 14-16; 40-47)

REASONS FOR GRANTING THE WRIT

THE DECISIONS OF THE LOWER COURTS DEPRIVE PETITIONERS OF REDRESS FOR THE VIOLATION OF THEIR FEDERAL STATUTORY RIGHTS AND THE TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, THUS MERITING THIS COURT'S REVIEW AND REVERSAL.

Based upon the erroneous dictum in *Affiliated Utes* that the AUC constituted the UDC and irrevocably delegated to the corporation the power to act as the "authorized representative" of the mixed blood Utes' interests in the undivided assets of the Ute Indian Tribe under § 677i of the Ute Partition Act, the UDC has purported to function in this capacity for approximately twenty years.

Despite the Petitioners' repeated protests to the Respondent Secretary of the Interior and the UDC, the UDC has and continues to make management decisions adverse to the mixed blood Utes' interest in undivided tribal assets of the Ute Indian Tribe, including decisions to deplete such assets, and to sell, transfer or otherwise alienate the mixed blood group's interests in such assets to individuals who are not mixed blood Utes and are expressly prohibited from sharing in tribal assets under § 677o of the Act. (App. 30)

Under Utah law, as a state corporation, the UDC can only represent the interests of its stockholders, the vast

majority of which are not mixed blood Utes. Petitioners herein own no stock in the UDC. Thus, they have no voting right or power to affect the management of their interests in indivisible tribal assets by the UDC. Accordingly, the UDC cannot legitimately function as the "authorized representative" of the mixed blood Utes to "take any action that is required by sections 677-677aa of this title to be taken by the mixed blood members *as a group*" under § 677e of the Act, in relation to the management of the mixed blood Utes' interests in undivided tribal assets pursuant to § 677i. (Emphasis supplied) (App. 23, 24-26)

The efforts of the Petitioners herein to challenge the right of the UDC to act as the authorized representative of the mixed blood Utes' interest in the undivided assets of the Ute Indian Tribe, have been wholly unsuccessful because the lower courts have felt constrained to follow this Court's erroneous dictum in *Affiliated Ute*. Since only this Court can make it possible for the mixed blood Utes to have a full and fair opportunity to litigate the authorized representative issue on the merits, by holding that the *Affiliated Ute* dictum does not preclude Petitioners from litigating the issue in this action, this Court should exercise its discretion in favor of granting the writ of certiorari requested by Petitioners.

Additionally, this Court should exercise its discretion in favor of granting the writ, because the lower courts fundamentally erred in holding that this Court's dictum in *Affiliated Ute* or this Court's decision in *Reyos*, precludes Petitioners from litigating the authorized representative issue in this action.

In affirming the trial court's decision, the Court of Appeals concedes that "had the Supreme Court decided the *Affiliated Ute* case alone, the Court's subsequent discussion of whether the AUC was the authorized representative of the mixed-blood Utes would have been unnecessary to the decision and therefore would not have precluded relitigation of that issue." (App. 10-11) Nevertheless, the Court of Appeals goes on to hold that because *Reyos* was consolidated with *Affiliated Ute* on appeal, and because this Court purportedly had to decide the authorized representative issue in *Reyos,* Petitioners are collaterally estopped from litigating this issue in the case at bar. (App. 11-12) This decision is unwarranted for several reasons.

First, the argument that Petitioners should be collaterally estopped from litigating the authorized representative issue under *Reyos,* was never made by the Respondents in the district court, formed no part of the district court's decision (App. 4, n.3), and should not have been considered by the Court of Appeals for the first time on appeal.

Second, although this Court indicated that *Reyos* and *Affiliated Ute* were consolidated on appeal because they arose out of the same factual milieu, 406 U.S. 128, 141, the court did not indicate that the authorized representative issue was an issue in each case. Indeed, this Court rendered separate findings and judgments in *Affiliated Ute* and *Reyos,* and made no findings or judgments concerning the authorized representative issue in *Reyos.* 406 U.S. 128 at 144-157.

Since the text of this Court's opinion in *Reyos* furnishes no support for the Court of Appeals' conclusion that the authorized representative issue was necessarily decided therein, the Court of Appeals must conjecture that

> In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued. . . . (App. 11),

and that in concluding that the record supported the district court's findings on damages and reinstating them,

> the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it was improper, the UDC would have no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless. (App. 11-12)

The Court of Appeals fails to explain why this Court would have necessarily had to decide any of the foregoing issues in *Reyos*, given the fact, which the Court of Appeals acknowledges, that the parties never raised or litigated these issues in *Reyos*. (App. 15)

Third, contrary to the decision of the Court of Appeals (App. 7-16), none of the requirements for the application of collateral estoppel are satisfied by this Court's prior decisions in *Affiliated Ute* or *Reyos*, whether these decisions are considered separately or together.

A. Identical Issue

The authorized representative issue was never raised or litigated in *Reyos* (App. 15), as this Court's delineation

of the lower courts' findings in *Reyos* reveals. 406 U.S. 128, at 145-149. More importantly, this Court made no findings regarding the authorized representative issue in *Reyos*. 406 U.S. 128, 150-157. Since the authorized representative issue was never raised or decided in *Reyos*, it could not be an issue in common with the issues in *Affiliated Ute*, as the Court of Appeals suggests. (App. 10-12)

Although the Court of Appeals observes that the authorized representative issue is identical to that raised in *Affiliated Ute* (App. 9), the Court of Appeals concedes that the dictum concerning this issue was unnecessary to the decision in *Affiliated Ute* and therefore cannot collaterally estop Petitioners from litigating the issue in this action. (App. 10-11) Thus, the "identical issue" requirement for the application of collateral estoppel to Petitioners cannot be met based on *Affiliated Ute*, as the Court of Appeal concluded. (App. 10-12)

B. Final Adjudication On The Merits

In *Reyos*, this court held that the defendant Bank and its officers had committed violations of the securities laws by encouraging mixed blood Utes to sell their stock for less than fair value, and that the record supported the damages awarded to the plaintiff mixed blood Utes by the district court. 406 U.S. 128, at 144-157. This Court was not required to resolve the authorized representative issue because the Petitioners in *Reyos* candidly stated that their claims for relief therein did not turn on the legality of the UDC but rather on the defendant Secretary of the Interior's failure to enforce the defendants' compliance

with regulations promulgated by the Secretary concerning the sale of UDC stock. (App. 35-36)

Based upon the foregoing, Petitioners contend that the authorized representative issue was not finally adjudicated in *Reyos* such that Petitioners are not precluded from litigating the issue herein.

C. The Individual Petitioners Are Not In Privity With The Plaintiffs In *Affiliated Ute* Or *Reyos*

The Court of Appeals held that "AUC was a party to both the *Affiliate Ute* case and to the instant case and therefore is bound by the prior judgment." (App. 12) However, Petitioners contend that the only judgment to which AUC is bound in *Affiliated Ute*, is a judgment dismissing the case for lack of subject matter jurisdiction. Thus, even if the individual Petitioners herein were in privity with the AUC and thus bound to the decision in *Affiliated Ute*, such decision would not preclude Petitioners from litigating the authorized representative issue in this action.

Similarly, assuming *arguendo* that the individual Petitioners are in privity with the AUC, and that the AUC was in privity with the Petitioners in *Reyos*, as the court of Appeals found (App. 13-14), the authorized representative issue was not litigated in *Reyos* and the judgment therein does not preclude Petitioners from litigating the authorized representative issue in this action.

Alternatively, Petitioners also respectfully submit that the Court of Appeals' conclusions that the individual Petitioners herein, Glen Mac Murdock and Mac Eugene

Murdock, are in privity with the AUC (App. 12-14), are unsupported and unwarranted.

The Court of Appeals' conclusion that "Glen Mac Murdock's claims derive from the AUC for the purposes of determining whether the AUC is the . . . authorized representative" (App. 13), is unfounded. Under § 677e of the Ute Partition Act (App. 23), the mixed blood Utes were not required to create any organization to manage their interests pursuant to § 677i of the Act. (App. 24)

Pursuant to § 677e of the Act, the mixed blood Utes were given the option of managing such interests by the majority vote of individual group members. (App. 23) Thus, the interests of the mixed blood Utes, including the individual Petitioners herein, in the indivisible tribal assets would still exist and be susceptible to management by the mixed blood Utes under § 677e of the Act, even if the AUC had never been created. Therefore, petitioner Glen Mac Murdock's standing to raise the issue of which organization, the AUC or the UDC, is the statutorily authorized representative of the mixed blood Utes for purposes of § 677i of the Act, plainly does not derive from his membership in the AUC, but from his status as a member of the mixed blood group which has the right to determine what entity, if any, shall serve as its authorized representative under § 677e of the Act.

The Restatement of Judgments, § 83, comment a, provides that the ability of a party to control the representation of his interests in the prior litigation, is critical to fulfill a function of privity to provide a day in court. There was no evidence before the district court or the Court of Appeals that Mr. Murdock had any ability to

control the representation of his rights by the AUC in *Affiliated Ute* or *Reyos*, or that he had notice of such purported representation.

Petitioner Eugene Mac Murdock, the son of Petitioner Glen Mac Murdock, is not even a member of the AUC. Petitioners contend only that he is eligible to be enrolled as a mixed blood Ute and is eligible for membership in the AUC. Thus, his standing to pursue relief in this action cannot be determined in advance of a decision on the merits of these claims. Since Petitioner Eugene Murdock is not a member of the AUC, there is simply no basis for the Court of Appeals' conclusion that he had any ability to affect the litigation of the authorized representative issue in *Affiliated Ute* or *Reyos*, or that he is in privity with the AUC. (App. 13, n.6)

The Court of Appeals' speculation that Glen Murdock or Eugene Murdock might benefit directly or indirectly from a ruling that the AUC and not the UDC is the statutorily authorized representative of the mixed blood Utes, or the fact that the individual Petitioners' claims relate directly to the AUC (App. 13), do not provide legally sufficient bases for holding that these individual Petitioners are in privity with the AUC in the *Affiliated Ute* or the *Reyos* cases and the Court of Appeals fails to cite any legal authority to buttress this conclusion. (App. 13)

For the foregoing reasons, Petitioners submit that the Court of Appeals' findings that the individual Petitioners herein are in privity with the plaintiffs in *Affiliated Ute* and *Reyos* are erroneous and that the privity requirement for collateral estoppel is not met as to these Petitioners.

D. Petitioners Have Not Had A Full And Fair Opportunity To Litigate The Authorized Representative Issue On The Merits

The authorized representative issue was not fully or fairly litigated in the *Affiliated Ute* case. The issue was not raised or decided in the district court (App. 17-20), or in the Court of Appeals. In affirming the dismissal of *Affiliated Ute* for lack of subject matter jurisdiction, the Court of Appeals stated: "It is not an issue in this case as to what organization on behalf of the mixed blood group has the right of management, and we do not so decide." *Affiliated Ute Citizens of the State of Utah v. United States*, 431 F.2d 1349, at 1350 (10th Cir. 1970).

Since the authorized representative issue was never litigated in the lower courts, there was no adequate opportunity for the facts and evidence concerning the authorized representative issue to be fully developed before the issue surfaced in this Court. The fact that the parties briefed and argued this issue on appeal in *Affiliated Ute* (App. 15), cannot render this Court's discussion of the issue binding on Petitioners where the case was dismissed for lack of subject matter jurisdiction and the Government mistakenly informed the Court that the AUC had created the UDC.

Dictum in *Affiliated Ute* that, "The formation of UDC was part of the plan formulated by the mixed bloods for the distribution of assets to the individual members of their group," 408 U.S. 128, at 136, was based on incorrect representations in the Government's brief that the UDC was created by the AUC perforce of a "plan" adopted by the mixed blood Utes in a general membership meeting of

July 14, 1956, as confirmed by AUC Resolution No. 56-66. (App. 37-39)

The Government did not attach a copy of Resolution No. 56-66 to its brief in *Affiliated Utes*. (App. 39, n. 8) However, reference to documents submitted by Petitioners in the lower courts demonstrate that the "plan" referred to in Resolution 56-66 did not refer to any plan by the AUC to form the UDC. The official minutes of the general membership meeting of July 14, 1956, submitted by Petitioners as evidence in this action, confirm that the only "plan" approved by the mixed blood Utes in that meeting, was a plan for the annual 1956-57 budget of the mixed blood Utes involving a distribution of assets to individual members of the group. (App. 40-44)

Another document presented by the Petitioners in this action, the "Report On Meeting Held July 14, 1956," issued contemporaneously by the AUC Board of Directors, also indicates that the plan for the distribution of assets to the mixed blood group adopted at the July 14, 1956 meeting, related only to the 1956-1957 budget. (App. 45)

The AUC Board of Directors Resolution 56-66, dated August 13, 1956, is also mistakenly cited in the Government's brief in *Affiliated Utes* as evidence that the AUC formed the UDC (App. 46-47). In this Resolution, the AUC states that it is "approving the Proposed Plan For The Distribution Of the Assets to the Individual Members of the Mixed Blood members . . . ratified by a unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah, on July 14, 1956." Again, reference to the minutes of that meeting (App.

40-44) confirms that the only "plan" approved by the general mixed blood membership concerned the 1956-57 budget and not the creation of the UDC.

The minutes of the Special General Membership Meeting of July 14, 1956, also indicate that the AUC, as the authorized representative of the mixed blood Utes, was jointly managing the taking of fish and game on the Uintah and Ouray Indian Reservation with the Business Committee, as the authorized representative of the full blood group. These minutes are direct evidence that the mixed blood Utes had not delegated the right to manage indivisible tribal assets, including the right to hunt and fish on the Uintah and Ouray Reservation, to be managed by the UDC. (App. 41)[1]

It should also be noted that as of July 14, 1956, when the Special General Membership meeting of the mixed blood Utes was held, neither the AUC nor the mixed blood Utes as a group, could have legally created the UDC, since statutory authorization for the creation of entities "to aid in the joint management with the Ute Indian Tribe of non-distributable assets," did not even

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[1] *See, U.S. v. Felter*, 752 F.2d 1505 (10th Cir. 1985) (holding that the right to hunt and fish on the Uintah and Ouray Indian Reservation is an indivisible asset of the Ute Indian Tribe and that Ute Partition Act did not terminate the right of Mixed Blood Utes to participate in such asset.)

exist until the amendment of the Ute Partition Act on August 2, 1956, by § 677p, thereof.[2] [3] (App. 31-32)

The plan submitted to this Court in *Affiliated Ute* pursuant to which the Government alleged that AUC had created the UDC (App. 39), was not the plan adopted in the Special General Membership meeting of the mixed

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[2] In other erroneous dictum in *Affiliated Ute*, this Court states that

> In January, 1959, the AUC directors by a unanimous vote (5-0) irrevocably delegated to UDC – and indeed, to other Utah corporations of the mixed bloods, Antelope-Sheep Range Company and Rock Creek Cattle Range Company, see § 13 of the Act, 25 U.S.C. 677l(3) – to accomplish the purposes for which they were formed. 406 U.S. 128, 136.

Petitioners contend that the UDC could not have been legally formed by the AUC directors pursuant to 25 U.S.C. § 677l(3) of the Act (App. 26), because § 677l(3) only authorized the creation of corporations for the distribution of assets which had already been divided by agreement of the mixed blood and full blood groups pursuant to § 677i of the Act. The UDC did not purport to manage divided assets, but to manage the mixed blood Utes' interest in the undivided and indivisible assets of the Ute Indian Tribe.

[3] Additionally, under § 677e of the Ute Partition Act, the UDC could not be established as the "authorized representative" of the mixed blood Utes, except by a "majority vote of the adult mixed blood members of the tribe at a special election authorized and called by the Secretary of the Interior." (App. 23) In *Affiliated Ute*, this Court found that there were approximately 490 mixed blood Utes as of April 5, 1956. 406 U.S. 128, 134, n. 5. The Court's statement in *Affiliated Ute* that "By a resolution adopted by a 42-5 vote at a special meeting at which a quorum was present and voting, AUC approved the Articles of Incorporation of UDC," 406 U.S. at 136, demonstrates that the UDC was not created in conformity with the express requirements of § 677e of the Act.

blood Utes on July 14, 1956, but was a plan that was proposed during the period 1951-1954, and published in 1955, by a planning committee of one of the three Bands that comprised the Ute Indian Tribe. This plan was one of several plans proposed by the various Band planning committees, and was never adopted by the AUC, which did not even exist at the time this particular "plan" was published in 1955. 406 U.S. 128, 135.

Based upon the foregoing, it is evident that the dictum in *Affiliated Utes* that the mixed-blood Utes created the UDC pursuant to a "plan formulated by the mixed-bloods for the distribution of assets to the individual members of the group," 406 U.S. 128, at 136, was based upon inaccurate information provided to this Court by the United States. Since the dictum regarding the creation of the UDC contained in *Affiliated Ute* was not grounded in the actual facts of the case, it should not be considered as an integral part of the court's opinion, *U.S. v. Crawley,* 837 F.2d 291, 292-293 (7th Cir. 1988), or given preclusive effect with regard to the determination of the authorized representative issue in this action.

This action is not, as the Court of Appeals suggests, a case where the Petitioners are disputing that they had a full and fair opportunity to litigate the authorized representative issue in *Affiliated Ute* or *Reyos,* simply because the Court purportedly resolved the issue against them. (App. 14-16)

For many years after the *Affiliated Ute* decision, Petitioners attempted to obtain the original documents from the United States to demonstrate that the Government had misrepresented the facts and documents pertaining

to the alleged formation of the UDC by the AUC. However, Petitioners were repeatedly advised that the Government was not in possession of the documents.

Recently, documents belonging to the AUC were fortuitously observed in a Bureau of Indian Affairs Office by an AUC member. It was later learned that the documents had been recently returned to the Bureau of Indian Affairs by one of the Government's attorneys who had obtained the documents in connection with the litigation of the *Affiliated Ute* and *Reyos* cases, and had retained the documents in his office for years since that litigation. These documents, presented in the lower courts and appended to this Petition (App. 40-47), conclusively establish that the representations made to this Court in *Affiliated Ute* that the AUC created the UDC pursuant to a plan adopted in conformity with the Ute Partition Act, were and are incorrect. Thus, the authorized representative issue was not fully and fairly litigated and the requirements of collateral estoppel are not met.

Should this Court affirm the decision of the Court of Appeals, the important and substantial statutory rights of the mixed blood Utes to have a meaningful voice in the management of their interests in the undivided assets of the Ute Indian Tribe, and to preserve these assets from unlawful alienation and dissipation by the UDC without due process of law, will be reduced to a mere footnote in history. Such a result would be manifestly unjust and contrary to the intent of Congress, which sought to protect the mixed blood Utes from the alienation of their interests in the undivided tribal assets of the Ute Indian Tribe under the Ute Partition Act.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully urge this Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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APPENDIX

Appendix A: *Murdock v. Ute Indian Tribe of Uintah & Ouray Resv.*, 975 F.2d 683 (10th Cir. 1992) .....App. 1

Appendix B: Unreported Order of the District Court .....App. 17

Appendix C: Judgment of District Court pursuant to Fed. R. Civ. P. 54(b)....App. 21

Appendix D: United States Code Sections Cited

25 U.S.C., §677e.....App. 23

25 U.S.C., §677i .....App. 24

25 U.S.C., §677l .....App. 26

25 U.S.C., §677m.....App. 29

25 U.S.C., §677o.....App. 30

25 U.S.C., §677p.....App. 31

Appendix E: Excerpts from Brief For Petitioners, *Affiliated Ute Citizens v. United States* .....App. 33

Appendix F: Excerpts from Brief For The United States And Brief For The Securities And Exchange Commission As Amicus Curiae In *Reyos, Affiliated Ute Citizens v. United States*.....App. 37

Appendix G: Minutes of Meeting, Board of Directors of the Affiliated Ute Citizens, Unitah & Ouray Agency, Fort Duchesne, Utah, July 14, 1956 ...App. 40

Appendix H: AUC Board of Directors, Report on Meeting Held July 14, 1956.....App. 45

Appendix I: AUC Board of Directors, Resolution No. 56-66 .....App. 46

APPENDIX A

Glen Mac MURDOCK, Jr., Mac Eugene Murdock, Affiliated Ute Citizens of the State of Utah, Plaintiffs-Appellants,

v.

UTE INDIAN TRIBE OF UINTAH AND OURAY RESERVATION, a Federal corporation; Luke J. Duncan, Stewart Pike, Gary Poowegup, St., Floyd Wopsock, Alvin Pinnecoose, Curtis Cesspooch, in their official capacity as members of the Business Committee of the Uintah and Ouray Indian Reservation, Defendant,

and

UTE Distribution Corporation, a Utah corporation; Manual Lujan, Jr., Secretary of the United States Department of the Interior, Defendants-Appellees.

No. 91-4112.

United States Court of Appeals,
Tenth Circuit

Sept. 9, 1992.

Kathryn Collard (Stephen Russell, with her on the briefs), of Collard & Russell, Salt Lake City, Utah, for plaintiffs-appellants.

Stephen Roth, Asst. U.S. Atty., Salt Lake City, Utah, Robert S. Thompson, III, of Whiteing & Thompson, Boulder, Colo., and Max D. Wheeler of Snow, Christensen & Martineau, Salt Lake City, Utah (Dee V. Benson, U.S. Atty., and Camille N. Johnson of Snow, Christensen & Martineau, Salt Lake City, Utah, with them on the brief), for defendants-appellees.

Before EBEL, Circuit Judge, McWILLIAMS, Senior Circuit Judge, and EISELE, Senior District Judge.*

EBEL, Circuit Judge.

In this appeal, we must determine whether collateral estoppel precludes the litigation of claims brought by the Affiliated Ute Citizens of the State of Utah and two individuals asserting that the Affiliated Ute Citizens of the State of Utah, and not the Ute Distribution Corp., is the authorized representative of the mixed-blood Utes for purposes of managing the mixed-blood Utes' portion of the Ute Tribe's indivisible assets. We conclude that the Supreme Court's opinion in *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), precludes the appellants from relitigating this issue. Accordingly, we affirm the district court's grant of summary judgment in favor of the Ute Distribution Corp. and its co-appellee.

I. Background

Mixed-blood Utes are those members of the Ute tribe who either possess less than one-half degree of Ute Indian blood, or who possess more than one-half degree but choose to become members of the mixed-blood group. Full-blood Utes possess at least one-half degree of Ute Indian blood and do not make such a choice.[1] *See* 25

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* The Honorable Garnett Thomas Eisele, Senior Judge, United States District Court for the Eastern District of Arkansas, sitting by designation.

[1] We use the same designations that the parties use and that appear in the statute.

U.S.C. §§ 677a(b) & 677a(c). Glen Mac Murdock, Jr., one of the appellants in this case, is a mixed-blood Ute. His son, Mac Eugene Murdock, is the second appellant. The third appellant is the Affiliated Ute Citizens of the State of Utah ("AUC"), which is an unincorporated organization of mixed-blood Utes. The appellees are the Ute Distribution Corporation ("UDC"), which manages the mixed-blood Utes' mineral interests, and the United States Secretary of the Interior.[2]

The Ute Indian Tribe was divided into full-blood and mixed-blood Utes by the Ute Indian Supervision Termination Act of August 27, 1954 ("Ute Partition Act"), 68 Stat. 868 (codified at 25 U.S.C. §§ 677-677aa). The Ute Partition Act partitioned tribal assets between the full-blood and the mixed-blood Utes and terminated federal supervision of mixed-blood property. The Act directed that the tribe's business committee, on behalf of the full-blood Utes, and the "authorized representatives" of the mixed-blood Utes should together divide the tribe's assets, and in the case of the mixed-blood Utes, distribute the pro-rata shares. *See* 25 U.S.C. § 677i. Certain indivisible assets, consisting primarily of mineral rights and unliquidated claims, were to be managed jointly by the business committee for the full-blood Utes and by an authorized representative of the mixed-blood Utes.

The mixed-blood Utes' "authorized representative" for purposes of the indivisible tribal assets was initially the AUC. The AUC allegedly delegated this authority to

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[2] The Ute Indian Tribe and members of its business committee were defendants below, but are not parties to this appeal.

the UDC in 1959; the AUC now disputes the validity of this delegation. The UDC issued ten shares of stock to each member of the mixed-blood group to represent his or her interest in the indivisible tribal assets. A number of mixed-blood Utes subsequently sold their shares at prices later determined to be substantially less than the stock's actual value.

For almost twenty-five years, the AUC has sought to challenge the legitimacy of the UDC's status as authorized representative of the mixed-blood Utes for purposes of managing their portion of the indivisible tribal assets. In a 1972 opinion, the Supreme Court concluded that the AUC had permanently delegated that authority to the UDC and stated, "Clearly it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 144, 92 S.Ct. 1456, 1467, 31 L.Ed.2d 741 (1972).

In the instant case, the appellants filed suit seeking various relief, including a declaratory judgment that the AUC and not the UDC was the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets. The UDC and the Secretary of the Interior argued that collateral estoppel now prevents the appellants from relitigating this issue. The district court agreed[3] and dismissed the UDC and the Secretary of the Interior from the

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[3] The district court concluded that several cases in addition to the Supreme Court's decision in *Affiliated Ute* precluded relitigation of these issues. *See Maldonado v. Hodel*, No. 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g*, 683 F.Supp. 1322 (D.Utah 1988); *United States v. Felter*, 752 F.2d 1505 (10th Cir.1985); *Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D.Utah

suit. The court later entered final judgment as to this single claim pursuant to Fed. R.Civ.P. 54(b). This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II. The Supreme Court's *Affiliated Ute* Decision

To determine whether the Supreme Court's decision in *Affiliated Ute* precludes relitigation of the issue of whether the AUC or the UDC is the authorized representative of the mixed-blood Utes for purposes of the indivisible tribal assets, we must first look to the background of that case. In *Affiliated Ute*, the Supreme Court granted certiorari in and consolidated two Tenth Circuit cases, *Affiliated Ute Citizens v. United States*, 431 F.2d 1349 (10th Cir.1970), and *Reyos v. United States*, 431 F.2d 1337 (10th Cir.1970), and decided them together. Although the AUC sponsored both cases, they involved different, albeit related, issues.

In *Reyos*, a group of mixed-blood Utes sued a bank that acted as transfer agent for the shares of UDC stock. Also named as defendants were several officers of the bank and the United States. The plaintiffs contended that

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1989), *rev'd*, 938 F.2d 1157 (10th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2273, 119 L.Ed.2d 200 (1992); *Hackford v. First Sec. Bank*, 521 F.Supp. 541 (D.Utah 1981), *aff'd*, Fed. Sec.L.Rep. (CCH) ¶99,402 (10th Cir.), *cert. denied*, 464 U.S. 827, 104 S.Ct. 100, 78 L.Ed.2d 105 (1983). In view of our conclusion that the Supreme Court's decision in *Affiliated Ute* constitutes collateral estoppel, we do not address the preclusive effects of these other decisions.

the bank and its officers had committed securities violations in encouraging mixed-blood Utes to sell their stock. The district court agreed and granted damages based on the difference between the fair market value of the UDC shares at the time of the sales and the value received by the sellers. The Tenth Circuit reversed, finding more limited liability and remanding for a recalculation of damages.

While *Reyos* was pending, the AUC filed the *Affiliated Ute* case against the United States. In *Affiliated Ute,* the AUC sought a pro-rata distribution of the mixed-blood Utes' share of the mineral interests and a declaration that the AUC and not the UDC was the authorized representative of the mixed-blood Utes for purposes of the mineral interest. The district court concluded that it did not have subject matter jurisdiction and dismissed the suit on that basis. The Tenth Circuit affirmed.

On certiorari, the Supreme Court consolidated the two cases and heard and decided them together. The Court affirmed the Tenth Circuit in the *Affiliated Ute* case, but reversed in the *Reyos* case, essentially reinstating the district court's decision *Affiliated Ute,* 406 U.S. at 156, 92 S.Ct. at 1473. Although the Supreme Court held that the district court properly dismissed the *Affiliated Ute* case for lack of jurisdiction over the United States, it nonetheless went on to discuss the "AUC's prayer for a determination as to management rights." *Id.* at 143, 92 S.Ct. at 1467. The court stated that the AUC had properly delegated its authority to the UDC and concluded, "Clearly, it is UDC and not AUC that is entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." *Id.* at 144, 92 S.Ct. at 1467. In dissent, Justice Douglas argued

that the AUC had never properly delegated authority to the UDC. *Id.* at 159, 92 S.Ct. at 1475 (Douglas, J., concurring in part and dissenting in part).

III. Collateral Estoppel

Collateral estoppel, also known as issue preclusion,[4] refers "to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 376 n. 1, 105 S.Ct. 1327, 1329 n. 1, 84 L.Ed.2d 274 (1985). "Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980) (citation and footnote omitted); *see also Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 (10th Cir.1990) (quoting *Allen*).

In considering collateral estoppel, we first must determine whether to apply federal or state law. We are a federal court examining a question of federal law upon which another federal court, namely the Supreme Court, has previously ruled. Under these circumstances, we

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[4] The terms "collateral estoppel" and "issue preclusion" are used interchangeably. *See Allen v. McCurry*, 449 U.S. 90, 94 n. 5, 101 S.Ct. 411, 415 n. 5, 66 L.Ed.2d 308 (1980); *Sil-Flo, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1520 n. 3 (10th Cir. 1990); *Koch v. City of Hutchinson*, 814 F.2d 1489, 1493 n. 1 (10th Cir.1987), *modified on other grounds*, 847 F.2d 1436 (10th Cir.), *cert. denied*, 488 U.S. 909, 109 S.Ct. 262, 102 L.Ed.2d 250 (1988).

must rely on the federal law of collateral estoppel.[5] *See Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313, 324 n. 12, 91 S.Ct. 1434, 1440 n. 12, 28 L.Ed.2d 788 (1971); *Meza v. General Battery Corp.*, 908 F.2d 1262, 1265 (5th Cir.1990); *Fireman's Fund Ins. Co. v. International Market Place*, 773 F.2d 1068, 1069 (9th Cir.1985); Restatement (Second) of Judgments § 87, at 314 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court"); 18 Charles A. Wright et al., *Federal Practice & Procedure: Jurisdiction* § 4466 (1981 & Supp.1992) [hereinafter *Federal Practice & Procedure: Jurisdiction*].

In the Tenth Circuit, collateral estoppel requires that four elements be met:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

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[5] In their briefs, the parties rely predominantly on the Utah law of collateral estoppel. The requirements for collateral estoppel under Utah law appear to be substantially the same as under federal law. *Compare Berry v. Berry*, 738 P.2d 246, 248 (Utah App.1987) (requirements for collateral estoppel under Utah law) *with United States v. Rogers*, 960 F.2d 1501, 1508 (10th Cir. 1992) (requirements for collateral estoppel under Tenth Circuit law).

United States v. Rogers, 960 F.2d 1501, 1508 (10th Cir.1992) (quoting *In re Lombard*, 739 F.2d 499, 502 (10th Cir.1984)); *see also Coffey v. Dean Witter Reynolds, Inc.*, 961 F.2d 922, 925 (10th Cir.1992). To determine if collateral estoppel prevents the appellants from litigating who is the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets, we must determine if these four factors have been met.

A. *Identical Issue*

The issue the appellants are attempting to litigate is the same as the one addressed previously by the Supreme Court. In the present case, the appellants seek a declaratory judgment "that the plaintiff AUC, and not the UDC, is the authorized representative of the mixed[-]blood Utes for purposes of the 'joint management' of indivisible assets of the Ute Indian Tribe." Verified Complaint, App. to Appellant's Opening Br., Doc. 1, at 22. The Supreme Court addressed which organization, the AUC or the UDC, properly exercised management rights over mineral rights. *Affiliated Ute*, 406 U.S. at 143-44, 92 S.Ct. at 1467. The appellants do not seriously dispute that the issues are identical.

B. *Finally Adjudicated on the Merits*

We hold that the Supreme Court did reach a final decision on the merits of whether the AUC was the mixed-blood Utes' authorized representative with respect to the indivisible tribal assets. Although resolution of this issue was unnecessary to the *Affiliated Ute* portion of the

opinion, its resolution was a necessary part of the Court's decision in the *Reyos* portion of its opinion.

Adjudication on the merits requires that the adjudication be necessary to the judgment. *See Block v. Commissioners*, 99 U.S. 686, 693, 25 L.Ed. 491 (1878) ("[A] judgment of a court of competent jurisdiction is [as between the parties or their privies] everywhere conclusive evidence of every fact upon which *it must necessarily have been founded.*") (emphasis added); *Insurance Co. of North America v. Norton*, 716 F.2d 1112, 1115 (7th Cir.1983) ("It is axiomatic that a party will be precluded by collateral estoppel from relying on an argument only where the determination as to the argument relied on was essential to the judgment in a prior action."); *Segal v. American Tel. & Tel. Co.*, 606 F.2d 842, 845 & n. 2 (9th Cir.1979) ("For the purpose of issue preclusion (collateral estoppel) . . . relitigation of an issue presented and decided in a prior case is not foreclosed if the decision of the issue was not necessary to the judgment. . . . "); 18 *Federal Practice & Procedure: Jurisdiction* § 4421. In particular, once a court determines that it does not have subject matter jurisdiction to consider a claim, any discussion of the merits of that claim is unnecessary to the judgment and therefore does not constitute collateral estoppel for purposes of future litigation of issues involved in that claim. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1272, 1279 (7th Cir. 1983).

In *Affiliated Ute*, the Supreme Court affirmed the Tenth Circuit's conclusion that the district court had correctly dismissed that case for lack of subject matter jurisdiction. Thus, had the Supreme Court decided the

Affiliated Ute case alone, the Court's subsequent discussion of whether the AUC was the authorized representative of the mixed-bloods Utes would have been unnecessary to the decision and therefore would not have precluded relitigation of the issue. The Court did not decide *Affiliated Ute* alone, however, but rather considered it along with *Reyos*.

In order to resolve the securities and damages claims against the bank and its officers in the *Reyos* portion of the case, it was necessary for the Court to determine whether the UDC was the mixed-blood Utes' authorized representative. The Supreme Court concluded that the bank and two of its officers had violated the securities laws and that the district court had properly computed damages. In order for the Court to evaluate the issue of damages for loss of the UDC stock, the court had to conclude that the stock was validly issued and had to determine the fair value of that stock. The district court had assessed the value of the UDC stock based on the assets held by the corporation, namely, the mineral rights, the unliquidated and unadjudicated claims against the United States, and all other indivisible tribal assets. Revenue from such assets were determined to be payable to the UDC and ultimately to be disbursed as dividends to the UDC stockholders. The Tenth Circuit had remanded for a recomputation of damages, but the Supreme Court concluded that the record supported the district court's finding on damages and therefore reinstated it. To reach this conclusion, the Supreme Court also had to conclude that the assignment of the indivisible assets to the UDC was proper, for if it were improper, the UDC would have

no rights with regard to the indivisible tribal assets, and the stock it issued would have been worthless.

Thus, there was a final adjudication on the merits with regard to the *Reyos* portion of the case that the rights to the indivisible assets of the mixed-blood Utes had been assigned to the UDC.

C. *Privity*

The AUC was a party to both the *Affiliate Ute* case and to the instant case and therefore is bound by the prior judgment. We must address, however, two related privity issues: (1) whether the individual appellants in the current case are in privity with the AUC and (2) whether the AUC is in privity with the plaintiffs in the *Reyos* case.

1. Privity between Murdock and the AUC

The issue of whether an association's actions bind its members is quite complex. *See Ethnic Employees of the Library of Congress v. Boorstin*, 751 F.2d 1405, 1410 (D.C.Cir.1985). Courts sometimes hesitate to find privity between an association and its members because the interests of all members may not be similar, and thus the association may not represent the interests of all members adequately. *See generally 18 Federal Practice & Procedure: Jurisdiction* § 4456. Conversely, where the association does adequately represent the interests of all members, a court will find privity. *See, e.g., Ellentuck v. Klein*, 570 F.2d 414, 425-26 (2d Cir.1978).

In this case, it is beyond dispute that Glen Mac Murdock's claims derive from the AUC for purposes of determining whether the AUC is the mixed-blood Utes' authorized representative. For purposes of this appeal, the relief sought by the appellants, including Glen Mac Murdock, relates directly to the AUC. If the courts were to declare the AUC the mixed-blood Utes' authorized representative, the AUC could then provide benefits (in whatever form) from the indivisible tribal assets to its members. To the extent that Glen Mac Murdock would benefit if relief were obtained, he would do so only in a derivative capacity owing to his status as a member of the AUC. We therefore have no difficulty holding that privity exists between Glen Mac Murdock and the AUC.[6] *Cf. Sea-Land Services v. Gaudet*, 414 U.S. 573, 593-94, 94 S.Ct. 806, 819, 39 L.Ed.2d 9 (1974) ("[N]onparties may be collaterally estopped from relitigating issues necessarily decided in a suit brought by a party who acts as a fiduciary representative for the beneficial interest of the nonparties. In such cases, 'the beneficiaries are bound by the judgment with respect to the interest which was the subject of the fiduciary relationship. . . . ' ") (citation and footnote omitted).

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[6] Mac Eugene Murdock is apparently not a member of the AUC. *See* Reply Br. of Appellants at 6. However, to the extent that he would not benefit from a declaratory judgment that the AUC is the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets, he has no standing to argue the issue. To the extent he would benefit from such a judgment, the same reasoning regarding privity that we apply to his father also applies to him.

To hold otherwise would lead to an untenable result. If a judgment regarding an association's status did not bind its members, then each member could relitigate the association's status until the association obtained a favorable result. This situation would undermine the very purpose of collateral estoppel.

2. Privity between the AUC and the Reyos Plaintiffs

The AUC sponsored the companioned *Reyos* case. All the plaintiffs in the *Reyos* case were members of the AUC. The AUC brought the *Affiliated Ute* case to provide an alternative remedy to the damages it viewed as inadequate in the *Reyos* case. The same attorneys represented the petitioners in both cases before the Supreme Court and filed a single brief. The AUC cannot now argue that its interests were not adequately represented during the *Reyos* litigation. Where an organization brings litigation in the name of individuals but retains "effective control", "[o]rdinary principles of preclusion by participation and control suggest that the organization should be subject to issue preclusion in later litigation." 18 *Federal Practice & Procedure: Jurisdiction* § 4456, at 492. Therefore, we hold that the AUC was in privity with the *Reyos* plaintiffs.

D. *Full and Fair Opportunity to Litigate*

The inquiry into whether a party had a full and fair opportunity to litigate an issue "[o]ften . . . will focus on whether there were significant procedural limitations in the prior proceeding, whether the party had the incentive

to litigate fully the issue, or whether effective litigation was limited by the nature or relationship of the parties." *Sil-Flo, Inc.*, 917 F.2d at 1521 (citation omitted). After consideration of these factors, we conclude that this final requirement for collateral estoppel was met.

The AUC's initial complaint in the *Affiliated Ute* case sought a determination of its status as the mixed-blood Utes' authorized representative "to exercise management privileges for its members with respect to their unadjudicated legal claims and the mineral estate." *See* Br. for Petitioners at 5, in App. to Joint Br. for Appellees UDC and United States, Tab 1. Because the district court dismissed that case for lack of subject matter jurisdiction, both the district court and the Tenth Circuit failed to reach this issue. Although the AUC did not raise the authorized representative issue in the *Reyos* case, the Supreme Court indicated its view that common issues arose in the *Reyos* and *Affiliated Ute* cases when it consolidated them. The AUC proceeded to brief the issue in its consolidated briefs and asked the Supreme Court to decide the issue. *See id.* at 6-7, 13, 41-44, 54-55; Reply Br. for Petitioners at 22-31, 36-37, 41, in App. to Joint Br. for Appellees UDC and United States, Tab 3.

Under these circumstances, the AUC cannot now complain that it did not have a full and fair opportunity to litigate the issue. It raised the issue in its initial complaint in one of the cases. It asked the Supreme Court to decide the issue in its brief, and it argued its position extensively. The Supreme Court did decide the issue. In fact, the AUC does not object to the Supreme Court's addressing the issue; rather, it objects only to the fact that the Supreme Court resolved the issue against it. An

adverse judgment does not reflect, however, on a party's opportunity to litigate an issue. Indeed, but for a prior adverse judgment, a party would not need to argue against collateral estoppel. We hold that the AUC had a full and fair opportunity to litigate its status as the mixed-blood Utes' authorized representative for purposes of the indivisible tribal assets.

IV. Conclusion

The Supreme Court's decision in *Affiliated Ute Citizens v. United States* meets the four elements for collateral estoppel that our precedent requires. The decision held that the UDC, and not the AUC, was the entity "entitled to manage the oil, gas, and mineral rights with the committee of the full-bloods." 406 U.S. at 144, 92 S.Ct. at 1467. Thus, the doctrine of collateral estoppel precludes the appellants here from relitigating that issue. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH – CENTRAL DIVISION

GLEN MAC MURDOCK, JR., MAC EUGENE MURDOCK and the AFFILIATED UTE CITIZENS OF THE STATE OF UTAH,

Plaintiffs,

vs.

UTE INDIAN TRIBE OF UINTAH & OURAY RESERVATION, a federal corporation; LUKE J. DUNCAN, STEWART PIKE, GARY POOWEGUP, SR., FLOWYD WOPSOCK, ALVIN PINNECOOSE, and CURTIS CESSPOOCK, in their official capacity as members of the BUSINESS COMMITTEE of the Uintah & Ouray Reservation, UTE DISTRIBUTION CORPORATION, a Utah Corporation; MANUEL LUJAN, JR., Secretary of the United States Department of Interior,

Defendants.

ORDER

Civil No. 89-C-982G

On February 2, 1990, the above entitled case came on for hearing on various motions, including defendant Ute Distribution Corporation's ("UDC") Motion to Dismiss or Alternatively for Partial Summary Judgment, which

motion was fully argued. After hearing argument by counsel, the court deferred ruling on UDC's motion and deferred fully hearing the other motions pending resolution of common issues in a case before the Honorable Chief Judge Bruce S. Jenkins, case number 85-C-569J, and in a case before the Honorable Judge David K. Winder, case number 89-C-959W. Following two en banc hearings regarding issues common to the three cases, on August 31, 1990, the en banc court made Findings of Fact, Conclusions of Law and entered a preliminary injunction addressing the rights of mixed-blood Indians to hunt and fish on tribal lands. The en banc court found, *inter alia*, that it has subject matter jurisdiction over matters concerning rights which are the subject of the 1954 Ute Termination Act, ch. 1009, 68 Stat. 868, codified at 25 U.S.C. §§ 677 ("Termination Act"), and that it has subject matter jurisdiction over matters concerning the interpretation and enforcement of provisions and the consequences of the Termination Act. The Tribe has appealed the August 31, 1990 preliminary injunction decision of the en banc court.

On October 10, 1990, a conference was conducted by this court to determine the status of the instant case in light of the proceedings and conclusions of the en banc court. At that time, the court ORDERED that the Motion to Dismiss filed by defendant Ute Indian Tribe on the basis of Sovereign Immunity was STAYED pending the resolution of its appeal of the preliminary injunction entered by the en banc court. The court further ORDERED that the Motion to Intervene filed by attorney Kent Higgins on behalf of several mixed-bloods was also STAYED pending the Tribe's appeal. Also pending in this

case is the Motion to Dismiss filed by defendant Manuel Lujan, Jr., Secretary of the United States Department of Interior. The court took under advisement defendant UDC's Motion to Dismiss, which all parties agreed previously had been fully briefed and argued. Now, being fully advised, the court enters this Order.

After having reviewed the briefs and the entire file of this case, and having heard extensive argument by counsel at the hearing of February 2, 1990, it is hereby

ORDERED, that defendant UDC's Motion to Dismiss is GRANTED. The court concludes that the numerous decisions by this court and others collaterally estops plaintiffs' claims for declaratory relief that Affiliated Ute Citizens ("AUC"), and not UDC, is the authorized representative of the mixed-blood Utes for purposes of joint management of indivisible assets of the Ute Indian Tribe pursuant to the Ute Partition Act. *See Affiliated Ute Citizens v. United States*, 406 U.S. 128, 139-44 (1972); *Maldonado v. Hodel*, 89-4035, Slip Op. (10th Cir. June 28, 1990), *aff'g* 683 F.Supp. 1322 (D. Utah 1988); *United States v. Felter*, 752 F.2d 1505 (10th Cir. 1985); *Ute Distribution Corp. v. United States*, 721 F.Supp. 1202 (D. Utah 1989); *Hackford v. First Security Bank*, 521 F.Supp. 541 (D. Utah 1981).

IT IS FURTHER ORDERED, that Defendant Lujan's Motion to Dismiss is GRANTED in light of the foregoing order. The Plaintiffs' Complaint alleges that Secretary of Interior Lujan has failed to recognize the representative authority claimed by plaintiff AUC. The court's order, *supra*, dismissing plaintiff's claims that AUC is the authorized representative of the mixed-blood Utes renders

plaintiffs' claims against defendant Lujan to be without support.

Counsel for defendant UDC and for defendant Lujan are directed to prepare a form of Judgment consistent with this Order and lodge the same with the court after compliance with local rule 13(e).

IT IS SO ORDERED.

DATED: OCTOBER 19, 1990.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

APPENDIX C

KATHRYN COLLARD, #0697
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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

GLEN MAC MURDOCK, JR., MAC EUGENE MURDOCK and the AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, Plaintiffs, v. UTE INDIAN TRIBE OF UINTAH AND OURAY RESERVATION, a federal corporation; LUKE J. DUNCAN STEWART PIKE, GARY POOWEGUP, SR., FLOYD WOPSOCK, ALVIN PINNECOOSE, and CURTIS CESSPOOCH, in their official capacity as members of the BUSINESS COMMITTEE of the Uintah and Ouray Indian Reservation, UTE DISTRIBUTION CORPORATION, a Utah Corporation; MANUEL LUJAN, JR., Secretary of the United States Department of the Interior, Defendants.	**ORDER GRANTING RULE 54(b) CERTIFICATION OF FINAL JUDGMENTS** CIVIL NO. 89-C-982-G

BASED upon Plaintiffs' Motion For Rule 54(b) Certification Of Judgments dated May 7, 1991 and the Stipulation To Plaintiffs' Motion For Rule 54(b) Certification Of Judgments, dated May 13 and 14, 1991, and good cause appearing, therefore IT IS HEREBBY ORDERED:

1. That pursuant to Rule 54(b), Federal Rules of Civil Procedure, this Court hereby directs the entry of final judgments on motions to dismiss, for defendant Ute Distribution Corporation and defendant Manuel LuJan, Jr., as to plaintiffs' claim for declaratory judgment that plaintiff Affiliated Ute Citizens, and not the Ute Distribution Corporation, is the authorized representative of the Mixed Blood Utes for purposes of the joint management of indivisible assets of the Ute Indian Tribe pursuant to the Ute Partition Act, more particularly set forth in the Judgment dated December 17, 1990, granting defendant Ute Distribution Corporation's motion to dismiss this claim, and Judgment dated December 19, 1990, granting defendant Lujan's motion to dismiss this claim.

DATED this 17 day of June, 1991.

BY THE COURT:

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

§ 677e. Organization of mixed-blood members; constitution and bylaws; representatives; actions in absence of organization

The mixed-blood members of the tribe, including those residing on and off the reservation, shall have the right to organize for their common welfare, and may adopt an appropriate constitution and bylaws which shall become effective when ratified by a majority vote of the adult mixed-blood members of the tribe at a special election authorized and called by the Secretary under such rules and regulations as he may prescribe. Such constitution may provide for the selection of authorized representatives who shall have power to take any action that is required by this subchapter to be taken by the mixed-blood members as a group: *Provided,* That nothing herein contained shall be construed as requiring said mixed-blood Indians to so organize if such organization is by them deemed unnecessary. In the event no such approved organization is effected, any action taken by the adult mixed-blood members, by majority vote, whether in public meeting or by referendum, but in either event, after such notice as may be prescribed by the Secretary, shall be binding upon said mixed-blood members of the tribe for the purposes of this subchapter.

(Aug. 27, 1954, c. 1009, § 6, 68 Stat. 868.)

§ 677i. Division of assets; basis; prior alienation or encumbrance; partition by Secretary upon nonagreement; assistance; management of claims and rights; division of net proceeds; applicability of usual processes of the law to originally owned stock of corporate representative and to corporate distributions

The tribal business committee representing the full-blood group, and the authorized representative of the mixed-blood group, within sixty days after the publication of the final membership roll, as provided in section 677g of this title, shall commence a division of the assets of the tribe that are then susceptible to equitable and practicable distribution. Such division shall be by agreement between them subject to the approval of the Secretary. Said division shall be based upon the relative number of persons comprising the final membership roll of each group. After such division the rights or beneficial interests in tribal property of each mixed-blood person whose name appears on the roll shall constitute an undivided interest in and to such property which may be inherited or bequeathed, but shall be subject to alienation or encumbrance before the transfer of title to such tribal property only as provided herein. Any contract made in violation of this section shall be null and void. If said groups are unable to agree upon said division within a period of twelve months from the date of such commencement, or any authorized extension of said period granted within the discretion of the Secretary, the Secretary is authorized to partition the assets of the tribe in such manner as in his opinion will be equitable and fair to both groups. Such partition shall give rise to no cause

of action against the United States and the costs of such partition shall be paid by the tribe. The Secretary is authorized to provide such reasonable assistance as may be requested by both groups, or by either group, in formulation and execution of a plan for the division of said assets, including necessary technical services of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah, and political subdivisions thereof, and members of the tribe. All unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall be managed jointly by the Tribal Business Committee and the authorized representatives of the mixed-blood group, subject to such supervision by the Secretary as is otherwise required by law, and the net proceeds therefrom after deducting the costs chargeable to such management shall first be divided between the full-blood and mixed-blood groups in direct proportion to the number of persons comprising the final membership roll of each group and without regard to the number of persons comprising each group at the time of the division of such proceeds.

The stock of any corporation organized by the mixed-blood group for the purpose of empowering the officers of such corporation to act as the authorized representatives of said mixed-blood group in the joint management with the tribe and in the distribution and[1] unadjudicated or unliquidated claims against the United States, all gas,

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[1] So in original. Probably should be "of".

oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to mortgage, pledge, hypothecation, levy, execution, attachment or other similar process, while such stock remains in the ownership of the original stockholder or his heirs or legatees, but the interest of stockholders in any distribution by such corporation shall be subject to the usual processes of the law.

(Aug. 27, 1954, c. 1009, § 10, 68 Stat. 873; Sept. 25, 1962, Pub.L. 87-698, 76 Stat. 597.)

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§ 677l. Distribution to individual members of mixed-blood group; preparation and approval of plan; assistance; provisions permitted in plan

After the adoption of a plan for the division of the assets between the two groups, a plan for distribution of the assets of the mixed-blood group to the individual members thereof shall be prepared and ratified by a majority of said group, within the period of six months from such adoption and presented to the Secretary for approval. The Secretary is authorized to provide such reasonable assistance, including necessary technical service of Government employees at Fort Duchesne, Utah, and arranging for necessary consultations with representatives of Federal departments and agencies, officials of the State of Utah and political subdivisions thereof, as may be required by the mixed-blood group in the preparation of such plan.

The plan for division of the assets among the members of the mixed-blood group may include:

(1) Complete disposition of all cash assets of said group, reserving, however, sufficient funds to cover –

(i) the proportionate share of said mixed-blood group in and to all expenses incurred in effecting the purposes of this subchapter, including, but not limited to, the necessary expense incurred under this section and section 677m of this title;

(ii) the just and proportionate share of the mixed-bloods in the expense incurred in the prosecution of the claims of the tribe, or the bands thereof, against the United States; and

(iii) the determinable and estimated administrative costs and expenses of any mixed-blood organization authorized by this subchapter, including lawful and reasonable salaries and fees of authorized agents, officers and employees of said mixed-blood group.

(2) Partition of the lands of the mixed-blood group, excepting all gas, oil, and mineral rights, to corporations, partnerships, or other legal entities, and to trustees, and the individual members of said groups, quality and quantity relatively considered, according to the respective rights and interests of the parties, located so as to embrace, as far as practicable, any improvements lawfully made by the person or persons receiving such land. The value of the improvements made, under a valid lease or assignment from the tribe, shall be excluded from the valuation in making allotments to the lessee or assignee, and the land must be valued without regard to such

improvements unless the lease or assignment, under which said improvements were made, provided that such improvements should become the property of the tribe. In the making of any partition due consideration shall be given to all of the rights and interests of the person or persons receiving the property, and all of the rights and interests of the other members of the tribe. Two or more of the members of said mixed-blood group may obtain their share of property as tenants in common, as joint tenants, or in any other lawful manner when such members agree among themselves as to the manner in which they desire to receive such title. When it appears that an equitable partition cannot be made among the members of said mixed-blood group without prejudice to the rights and interests of some of them, and yet a partition is directed by the group, the members of said group may voluntarily determine compensation to be made by one party to another on account of the inequity. In all cases where equity is agreed upon by the members of said mixed-blood group, such compensatory adjustment among the parties, according to the principles of equity, must be approved by the Secretary. In the event of a failure to agree upon an equitable compensatory adjustment among the parties the Secretary shall make such adjustment and his decision shall be final.

(3) Organization of corporations for the grazing of livestock, handling of water and water rights, and the shares therein may be issued to the members of said group in proportion to their interests in the assets of such corporations. When, in the opinion of said mixed-blood group, it is to the best interest of said group to transfer a portion of the assets of said group to a corporation or

other legal entity for any purpose, the Secretary is authorized to make such transfer.

(4) A transfer of assets to one or more trustees designated by said group who shall hold title to all or any part of the property of said group for management or liquidation purposes under terms and conditions prescribed by said mixed-blood group. The Secretary is authorized to make such transfer, and approve the trustees, and the terms and conditions of the trust.

(5) Sale of any portion of the assets of said group subject to the approval of the Secretary. In addition to the sales herein otherwise authorized, authority is granted to the authorized representatives of said group to sell any property of said group when, in the opinion of the majority of said mixed-blood group, a practicable partition cannot be made, or for any other reason it is deemed to the best interests of the group, and the proceeds of such sales shall be distributed equitably among the members of said mixed-blood group; after deducting reasonable cost of sale and distribution.

(Aug. 27, 1954, c. 1009, § 13, 68 Stat. 874.)

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§ 677m. Same; procedure by Secretary if distribution not completed within seven years from August 27, 1954

In the event all the tribal assets, susceptible to equitable and practicable distribution, distributed to the mixed-blood group under the provisions of section 677i of this title, are not, within seven years from August 27, 1954,

distributed to the individual mixed-blood members as contemplated in the plan to be adopted in accordance with the provisions of section 677*l* of this title, so as to effectively terminate Federal supervision over said assets, then the Secretary shall proceed to make such distribution in a manner, in his discretion, deemed fair and equitable to all members of said group, or convey such assets to a trustee for liquidation and distribution of the net proceeds, or convey such assets to the persons entitled thereto as tenants in common. Aug. 27, 1954, c. 1009, § 14, 68 Stat. 875.

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§ 677o. Termination of restrictions on individually owned property of the mixed-blood group

(a) Transfer of control of trust property; removal of sales restrictions

When any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i of this title, whether such distribution is made in part or in whole to a corporation, partnership, or trusteeship in which he is interested, or otherwise, the Secretary is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States, and shall further remove all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of

such member and his property shall thereby be terminated, except as to his remaining interest in tribal property in the form of any unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other tribal assets not susceptible to equitable and practicable distribution, all of which shall remain subject to the terms of this subchapter, notwithstanding anything contained herein to the contrary.

(Aug. 27, 1954, c. 1009, § 16, 68 Stat. 875.)

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§ 677p. Tax exemption; exceptions and time limits; valuation for income tax on gains or losses

No distribution of the assets made under the provisions of sections 677-677aa of this title shall be subject to any Federal or State income tax: *Provided,* That so much of any cash distribution made under said sections as consists of a share of any interest earned on funds deposited in the Treasury of the United States shall not by virtue of said sections be exempt from individual income tax in the hands of the recipients for the year in which paid. Property distributed to the mixed-blood group pursuant to the terms of said sections shall be exempt from property taxes for a period of seven years from August 27, 1954, unless the original distributee parts with title thereto, either by deed, descent, succession, foreclosure of mortgage, sheriff's sale or other conveyance: *Provided,* That the mortgaging, hypothecation, granting of a right-of-way, or other similar encumbrance of said property shall

not be construed as a conveyance subjecting said property to taxation under the provisions of this section. After seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe under the provisions of sections 677-677aa of this title, and all income derived therefrom by the individual, corporation, or other legal entity, shall be subject to the same taxes, State and Federal, as in the case of non-Indians; except that any corporation organized by the mixed-blood members for the purpose of aiding in the joint management with the tribe and in the distribution of unadjudicated or unliquidated claims against the United States, all gas, oil, and mineral rights of every kind, and all other assets not susceptible to equitable and practicable distribution shall not be subject to corporate income taxes. Any valuation for purposes of Federal income tax on gains or losses shall take as the basis of the particular taxpayer the value of the property on the date title is transferred by the United States pursuant to said sections. Aug. 27, 1954, c. 1009, § 17, 68 Stat. 876; Aug. 2, 1956, c. 880, § 3, 70 Stat. 936.

APPENDIX E

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1331

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL.,

Petitioners,

-V.-

UNITED STATES, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The orders of the United States District Court for the district of Utah entering judgment for plaintiffs in *Reyos v. First Security Bank* (Reyos herein), and dismissing *Affiliated Ute Citizens of the State of Utah v. United States* (*AUC* herein) on the merits and for lack of jurisdiction, are unreported (A.[1] 573

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[1] "App." refers to the Appendix of pertinent Statutes and Regulations appearing at the back of this brief. "A" refers to the separately bound Appendix of proceedings herein. "E" refers to the Exhibit volume of the Appendix. "R" refers to the Record.

QUESTIONS PRESENTED

1. Whether bankers who contract to enforce the Indian laws and regulations applying to an Indian corporation, by acting as its transfer agent, depository for the individual Indian's stock, and agent for the conduct of the business of the corporation, violate Rule 10b-5:

(a) When they secretly act simultaneously as market makers for the stock, or as agents for or in aid of non-Indian purchasers?

(b) When they cause stock transfers to be made in a manner other than as specified in the Indian laws and regulations?

(c) When they withhold information designed to discourage the Indian from selling his stock?

(d) When they alter or misrepresent documents filed with government officials primarily responsible for supervising the sale of Indian property?

2. Does the reference to conduct "in connection with the purchase or sale of any security" in Rule 10b-5 mean that the defendant must be acting in his own interest, as a purchaser or seller, for a profit?

3. Under an Indian termination act, declaring a phased withdrawal of Government services rendered to Indians and an end to supervision of their restricted property:

(a) Are the Indians deprived, by implication, of any interest in their property, or do they lose their cultural identity as American Indians so that benefits of law other than under Federal statutes are eliminated by implication?

(b) Is BIA's administrative modification or acquiescence in the modification of termination procedures prescribed by Congress, so that protections to Indians and their property are eliminated or reduced, actionable negligence?

(c) Does publication of a "termination proclamation" eliminate the Government's duty to Indians with respect to limited supervisory functions Congress directed be performed after publication, or as to property over which the Government retains limited supervisory control?

4. The subsidiary question in *AUC* of whether the United States District Court has jurisdiction to determine an Indian's rights in property, including management rights, purportedly granted under a termination act?

5. The subsidiary question in *Reyos* of what relief is appropriate to the individual Indian?

* * *

D. *The UDC Stock Sales.*

The substitution of a corporate charter for the constitution and bylaws prescribed by the Termination Act injected a new element into Congress' termination program – corporate stock is subject to sale, but membership in the unincorporated association, like a person's citizenship, is not. Apart from the question of the propriety of the formation of UDC, however, the sales of UDC stock to non-Indians were accomplished in a manner which deviated from the regulations adopted by the Secretary. That is, whether the Secretary had authority to do so or not, he did form UDC and promulgate regulations concerning it,

and if he had required strict compliance with those regulations the improper sales could not have occurred. The *Reyos* plaintiffs claim the action of BIA in permitting the deviation was negligent and that the course of business employed by the Bank's officers pursuant to the deviations amounts to fraud.

* * *

APPENDIX F

No. 70-78

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.,

ANITA REYOS, ET AL., PETITIONERS

v.

FIRST SECURITY BANK OF UTAH, N.A., UNITED STATES OF AMERICA, ET AL.,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND BRIEF FOR THE SECURITIES AND EXCHANGES COMMISSION AS AMICUS CURIAE IN *REYOS*

ERWIN N. GRISWOLD
Solicitor General

SHIRO KASHIWA
Assistant Attorney General

A. RAYMOND RANDOLPH, JR.
Assistant to the Solicitor General

EDMUND B. CLARK
Attorney, Department of Justice
Washington, D. C. 20550

G. BRADFORD COOK
General Counsel

WALTER P. NORTH
Associate General Counsel

THEODORE SONDE,
Assistant General Counsel

RICHARD S. SELTZER
Special Counsel
Securities and Exchange Commission
Washington, D.C. 20549

* * *

The Ute Distribution Corporation was formed in 1958 for the purpose of managing "jointly with the Tribal Business Committee of the full-blood members of the Ute Indian Tribe * * * all unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind, and all other assets not susceptible to equitable and practical distribution to which the mixed-blood members of the said tribe * * * may become entitled * * * and to receive the proceeds therefrom and to distribute the same to the stockholders of this corporation * * * " (Ex. App. 3-4). Formation of a corporation and issuance of stock for these purposes constituted part of the plan

formulated by the mixed-bloods for distributing assets to the individual members of their group (Ex. App. 141).[8]

* * *

[8] Resolution No. 56-66 of Affiliated Ute Citizens states that the "plan was ratified by unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah on July 14, 1956." This Resolution is not contained in the record in these cases but is part of the record in *Affiliated Ute Citizens, et al. v. United States*, No. 156-69, Court of Claims, where it is included as Affidavit No. 3, Item 9, in support of the government's motion for summary judgment, which is currently pending. (The same counsel represents petitioners here and plaintiffs in the Court of Claims case.)

APPENDIX G

MINUTES OF MEETING
BOARD OF DIRECTORS OF THE
AFFILIATED UTE CITIZENS
UINTAH & OURAY AGENCY,
FORT DUCHESNE, UTAH
JULY 14, 1956

The meeting of the Special General Membership meeting of the Affiliated Ute Citizens of the State of Utah was called yo [sic] order by the President of the Board of Directors, Lula H. Murdock with 54 eligible voters present.

The first item of business was the introduction of the Board of Directors and the Superintendent, Mr. John O. Crow.

After the introductions the first matter of business was the proposed Budget for the Fiscal Year 1957. Superintendent Crow had been asked by the Board of Directors to read the Budget as was proposed and explain the same to the group. Connie Mack Denver objected to Mr. Crow reading the budget on the grounds that he felt it was a matter of our own business and that the Board of Directors should present it themselves.

Mr. Crow divided the Budgetbinto [sic] two sections, the money that would be used on joint operations with the Full-Bloods and the funds that would be used by the Mixed-Bloods separately. The Budget consisted of 20 Sections as follows:

Section 1.	Prosecution of Claims.....	$ 27,000.00
Section 2.	Legal Counsel	2,575.00
Section 3.	Budget & Finance.....	2,705.00

Section 4.	Fish & Game	3,659.00
Section 5.	Range Management	2,416.00
Section 6.	Credit	1,673.75
Section 7.	Public Law 671 Expenses..	2,504.00
Section 8.	Inventory Cost.....	1,000.00
Section 9.	Audit Expense.....	1,000.00
Section 10.	Automatic Raises .....,	500.00
Section 11.	Office Expense.....	600.00
Section 12.	Office Supplies.....	400.00
Section 13.	Telephone & Telegraph....	350.00
Section 14.	Travel	2,000.00
Section 15.	Board of Director Meetings	18,200.00
Section 16.	Equipment.....	1,000.00
Section 17.	General Fund.....	5,000.00
Section 18.	Per Capita Payment ($4500)	2,205,000.00
Section 19.	Per Capita Payment ($500.00).....	245,000.00
Section 20.	Per Capita Payment ($500.00).....	245,000.00
	Total.....	$2,767,582.75

The first ten sections of the Budget are the items that will be managed jointly with the Full-Blood Group. After a discussion on several items in the budget a motion was made by Thelma C. Forg to approve the Proposes [sic] Budget as presented, this was seconded and the motion carried.

The next item of business on the agenda was the Supplement to the Plan for the Division of the Assets to Members of the Mixed-Blood Group which pertains to how our Law & Order problem will be handled. Dudley Burson made a motion that we approve the Supplement to the Plan, this was seconded and the motion carried.

The next item was to change the Constitution and By-Laws, have an amendment made to state a Special General Membership Meeting could be called in 15 days instead of 30 days as sometimes there is great need for an immediate meeting. This was agreed upon and David Harris Workman made the motion and it was seconded and carried.

The next item on the agendaawas [sic] what we intended to do in regards to our Attorney. Whether or not the group was in favor of rehiring Mr. John S. Boyden to continue to act in our behalf.

Sarah Hackford stated that she was not campaigning for Boyden but she felt that the group should rehire him as he was well acquainted with our affairs and could go on without any study.

Arthur Workman stated that he was not in favor of Boyden as he had been rehired by the Full-Blood Group and that he could not represent both the Full-Blood Group and the Mixed-Blood Group. He suggested that possibly the Board of Directors could contact other Lawyers and see what they would work for and then report back to the group.

Margaret Phillipps stated that she understood that Mr. Boyden could not legally represent the two groups and that he could be disbarred if he attempted to do so.

Irma Sutteer stated that she felt that alot of the people that were opposing the hiring of Mr. Boyden were doing so from a personal grudge standpoint, and that they were overlooking the fact that he had done alot of good for the Tribe.

Stacey Reed stated that he felt that Mr. Boyden had too many iorns [sic] in the fire now that he was campaigning for the Governor of the State and that he could not do us justice if he was successful in this campaign.

Lillial Young made the motion that it be put to a vote to see how many were in favor of hiring Mr. Boyden.

Della Curry stated if Mr. Boyden could work for the Full-Bloods where were we any different that he was a good man and had many good things for the tribe.

After a lengthy discussion on the suggestion that we have several attorneys attend the next meeting and have Mr. Boyden here to talk to the group. Mrs. Young with drew her motion and the discussion continued.

Mary Harris stated that we would be doing a great wrong if we put Boyden out now as he was a good man. That the best thing for the group to do was to hire him again.

Earl Gardner made the motion that we hire Mr. John S. Boyden for another year the motion was seconded and the vote was by raising of hand and the vote was counted as 36 members for the hiring of Mr. Boyden and 12 against.

Arthur Workman stated to let the ones that wanted him pay for his salary but President Murdock stated that the majority rules and that was what we would be governed by what the majority wants.

Motion was made by Connie Mack Denver that the Board of Directors ask for the $4500 per capita payment on the following Monday. Motion was seconded and carried.

The report of the business done by the Board of Directors was read by the Secretary. David Harris Wrokman [sic] made a motion that hereafter the report be read at the beginning of the meeting. Motion was seconded and carried.

There being no further business at this time Elizabeth Bumgarner made a motion to ajourn and it was seconded by Elmer Hackford. Motion was carried and the meeting ajourned.

APPROVED:

_____ _____

Elizabeth Bumgarner, Secretary
Board of Directors of the
Affiliated Ute
Citizens of the State of Utah.

APPENDIX H

REPORT ON MEETING HELD JULY 14, 1956

For your information we are sending the following report on the Special General Membership Meeting held at Fort Duchesne, on the 14th day of July, 1956

1. Enclosed itimized budget for the fiscal year 1957 was approved unamimously by the membership.

2. Plan for the Distribution of the Assets to the Individual Mixed-Blood members was ratified with one amendment, to include the two $500 per capita payments that are proposed for payment in December and March. The Supplement to the Plan was also approved in regards to our paying a share of the cost of the Law & Order.

3. Amendment was approved to be made to the Constitution and By-Laws, allowing us to call a Special General Membership Meeting in fifteen days instead of thirty days,

4. John S. Boydon was employed for another year as our attorney and General Legal Counsel.

The Board of Directors

APPENDIX I

PC. 56-66

Uintah and Ouray Agency
Fort Duchasne, Utah

August 13, 1956

BE IT RESOLVED BY THE BOARD OF DIRECTORS OF THE AFFILIATED UTE CITIZENS OF THE STATE OF UTAH THAT: We hereby approve the Proposed Plan for the Distribution of the Assets to the Individual Members of the Mixed-Blood Members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah. Said plan was ratified by unanimous vote by the membership at a Special General Membership Meeting held at Fort Duchesne, Utah on July 14, 1956.

Be It Further Resolved that we hereby approve the Supplement to the Plan for the Distribution of the Assets to the Individual Members of the Ute Indian Tribe, with regards to the Law & Order for said Mixed-Blood Group.

/s/ Lula H. Murdock
Lula H. Murdock,
President

/s/ Preston Allen
Preston Allen,
VicePresident

/s/ Elmer Hackford
Elmer Hackford,
Member

/s/ Elizabeth Bumgarner
Elizabeth Bumgarner,
Member

/s/ Henry Wopsock
Henry Wopsock,
Member

CERTIFICATION

I hereby certify that the above resolution was adopted by the Board of Directors of the Affiliated Ute Citizens of the State of Utah at a Special meeting held at Fort Duchesne, Utah on the 13th day of August, 1956, by a vote of 5 for and 0 against.

/s/ Elizabeth Bumgarner
Elizabeth Bumgarner,
Secretary
Board of Directors